IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 23, 2003

STATE OF TENNESSEE v. EDWARD R. FORESTER

Direct Appeal from the Criminal Court for Monroe County
No. 00023 Carroll Ross, Judge

No. E2003-00408-CCA-R3-CD
October 28, 2003

The Defendant, Edward R. Forester, was convicted by a jury of aggravated burglary, a Class C felony. See Tenn. Code Ann. § 39-14-403(b). He was sentenced as a Range III offender to eleven years to be served in the Department of Correction. In this direct appeal, he challenges the sufficiency of the evidence and the length of his sentence. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., joined. JAMES CURWOOD WITT, JR., J., not participating.

William Donaldon, Athens, Tennessee and Julie A. Rice, Knoxville, Tennessee, for the appellant, Edward R. Forester.

Paul G. Summers, Attorney General and Reporter; John Bledsoe, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Chalmers Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Regina Hensley testified that, on the morning of November 4, 1999, she went to her parents' house to give her disabled mother a bath. Her father, Sam Raper, looked out the back door and noticed that a red truck was parked at Ms. Hensley's house, which was separated from her parents' house by only a field. When Ms. Hensley arrived in her driveway, she saw a man inside her house looking out the front door. Ms. Hensley went into her house and saw the intruder going around her kitchen table and out the back door. From her front porch, Ms. Hensley watched the man get into his truck. Although the man attempted to hide his face with his blue jean jacket, Ms. Hensley testified that she got a good look at his face. As he got into his truck, she saw him lay a gun, which

he had taken from her house, in the seat of his pickup. As the man drove away, Ms. Hensley noticed his license plate number.

Ms. Hensley then went inside her house and called 911. She tried to remember the license plate number that she had seen, but she could not "because [she] was so shook up." However, she did give them what she thought to be the license number. Ms. Hensley discovered that a jar of money and old coins, which she and her husband kept in the top of the hall closet, was laying on the couch, empty. She also verified that the intruder had taken a gun from her bedroom closet.

Ms. Hensley described the truck the man was driving as small, old, and red with white pinstripes on each side. Detective Kenny Hope went to Ms. Hensley's house in order for her to view a photographic lineup. She was unable to identify the intruder from the first lineup, although the Defendant's picture was in that array. She did pick the Defendant's photograph out of a second lineup, shown to her at a later time. At trial, Ms. Hensley identified the Defendant in open court as the person she saw leaving her house on the day in question.

Detective Kenny Hope testified that he went to Ms. Hensley's house to investigate the burglary. He was able to lift a latent fingerprint from the jar that contained Ms. Hensley's money. He also interviewed Ms. Hensley. The license tag number she have him was 468SJP. However, the truck to which that license tag was registered did not fit the description of the vehicle given by Ms. Hensley. Some time later, Detective Hope received information regarding the vehicle used in the burglary. As a result of this information, the detective located the bed of a small Toyota truck that matched the description of the truck Ms. Hensley gave. Upon viewing a photograph of the truck bed, Ms. Hensley confirmed that it had come from the truck that was used in the burglary of her house. The truck bed was found at the Defendant's residence. At this point in Detective Hope's investigation, the Defendant became the prime suspect.

Eventually, a police officer saw the Defendant driving the cab and chassis of the Toyota truck and performed a traffic stop. Detective Hope testified that the truck cab had been painted black, but the red paint and pinstripes were still visible.[1] The license plate number on the truck the Defendant was driving was 438SJP. The Defendant was placed under arrest and fingerprinted, and his photograph was inserted in a photographic lineup. Although Ms. Hensley had already viewed a lineup which contained a photo of the Defendant and was unable to identify him, Detective Hope allowed her to view a second array of photos that contained a more recent depiction of the Defendant. From this second lineup, Ms. Hensley identified the Defendant as the man she saw at her house.

On cross-examination, Detective Hope testified that he submitted the fingerprint found on the victim's money jar to Monica Datz with the sheriff's office for analysis. He admitted that, prior to Ms. Datz examining the print, he had the fingerprint analyzed by an expert in Loudon County, who stated that he was not able to conduct an identification or comparison because of the poor

[1]The bed of the truck retained the original red paint and white pinstripes.

quality of the fingerprint. However, Detective Hope also testified that the examiner from Loudon County spent only two or three minutes looking at the print before he declared that he was unable to use it for comparison purposes.

Monica Datz, the fingerprint examiner for the Monroe County Sheriff's office, testified that she analyzed the fingerprint given to her by Detective Hope, which was lifted from the jar in which Ms. Hensley kept her money. Ms. Datz compared this print to the Defendant's fingerprints, and she concluded that the two fingerprints matched.

Leon Freeman, the Defendant's brother-in-law, testified for the defense. He testified that around September 23, 1999, he bought from the Defendant the truck bed that had been attached to the Defendant's Toyota truck. He further testified that the truck was not running on November 4, 1999, the date of the burglary, because the Defendant and he were changing the engine of the vehicle. He stated that they finished with the engine work "right around then, the 4th, 5th, somewheres [sic] along in there." However, they were unable to complete the wiring on the vehicle. Although Mr. Freeman testified that the Defendant's truck could not have been used in the burglary because it was not yet running, he acknowledged that he did not divulge that information to the police until a court proceeding in October of 2001.

Dennis Winkler also testified on the Defendant's behalf. He stated that the Defendant contacted him on November 2, 1999, about wiring his Toyota truck. He said that, at that time, the truck was not fitted with a distributor cap, without which it would not run. Mr. Winkler went to look at the truck on November 3; however, he did not perform the wiring work on the truck because he left on a hunting trip later that day.

Donnie McDaniel, the Defendant's uncle by marriage, testified that he wired the engine of the Defendant's pickup truck on November 5, 1999. He further testified that there was no way the truck could have run before he performed the wiring work. He said that he remembered wiring the truck on the fifth because he received his disability check on the third and paid his bills on the fourth. On cross-examination, Mr. McDaniel admitted that he never told the police that the Defendant's truck was not running on November 4.

The Defendant's father, Verlin Forester, also testified that the Defendant's truck was not operable on November 4, 1999, because it was not properly wired. Mr. Forester testified that he took the Defendant to work at 7:00 a.m. on the fourth of November. Mr. Forester stayed with the Defendant until approximately 10:00 or 10:30 in the morning, at which time he left. When he returned between 2:00 and 2:30, the Defendant was still there working. Mr. Forester testified that the Defendant's truck was repaired and running on either the fifth or sixth of November. Mr. Forester admitted that he did not make Detective Hope aware that his son was working on November fourth and that his truck was not running on that date. By way of explanation, Mr. Forester stated, "I just didn't figure that he'd believe me, so there wasn't no use in me talking to him about it, you know."

On cross examination, the prosecutor asked Mr. Forester why November 4 stood out in his mind. Mr. Forester responded that he always went deer hunting when muzzle-loader season opens. He went hunting on November 3, and the next morning, he took the Defendant to work. When the prosecutor confronted Mr. Forester with a copy of the 1999-2000 Tennessee Hunting and Trapping Season Guide, which listed November 8 as the date on which muzzle-loader season opened, Mr. Forester stated that he must have been poaching because he knew that he had been hunting on November 3, 1999.

Jeff Moses, whose wife was the Defendant's first cousin, testified that the Defendant worked on his property trimming trees on November 4. Mr. Moses testified that the Defendant and his father, Mr. Forester, arrived at about 7:00 a.m. in a red and white Chevrolet pickup. Shortly thereafter, Mr. Moses left for work. When Mr. Moses returned at about 2:00 or 2:30 in the afternoon, the Defendant was performing the requested work. For his labor, Mr. Moses paid the Defendant with a check, which was dated November 4, 1999, and this check was introduced as an exhibit. On cross examination, Mr. Moses admitted that he had not informed the police that the Defendant was on his property trimming trees on November 4, 1999.

Based upon this evidence, the jury found the Defendant guilty of the aggravated burglary of Regina Hensley's residence. The Defendant argues that the evidence presented to the jury was insufficient to sustain his conviction for aggravated burglary. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Smith, 24 S.W.3d 274, 278 (Tenn. 2000). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. See McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Buggs, 995 S.W.2d 102, 105-06 (Tenn. 1999); State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914; see also Smith, 24 S.W.3d at 279. The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191; see also Buggs, 995 S.W.2d at 105. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. See Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

Aggravated burglary is burglary of a habitation. See Tenn. Code Ann. § 39-14-403(a). "A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building and commits or attempts to commit a felony, theft or assault." Id. § 39-14-402(a)(3). The Defendant does not contend that an aggravated burglary did not occur; rather, he argues that the evidence was not sufficient to establish his identity as the burglar. In support of his challenge to the sufficiency of the evidence, the Defendant attacks the credibility of the State's witnesses. He points out that Ms. Hensley was unable to identify him from the first photographic lineup she viewed. Second, he notes that, although Monica Datz testified that the fingerprint found on Ms. Hensley's money jar belonged to the Defendant, another expert told Detective Hope that it was useless for comparison purposes. He also cites to the testimony of his own witnesses, who testified that he was working on the fourth of November and that his truck was not operable on that date.

This Court does not resolve questions involving the credibility of witnesses or the weight and value to be given the evidence. See State v. Nash, 104 S.W.3d 495, 500 (Tenn. 2003). Those are matters entrusted to the trier of fact, not the appellate courts. See id.

Viewing the evidence in the light most favorable to the State, we conclude that it is sufficient for a rational trier of fact to find beyond a reasonable doubt that the Defendant burglarized the victim's house. The evidence established that Ms. Hensley saw a man inside her house. As he was leaving, she noticed that he had taken a gun from her bedroom closet. She later observed that he had taken money from a jar that she kept in a hall closet. As the man was leaving, Ms. Hensley saw his face. From a photographic lineup, she identified the Defendant as the man she had seen. Although she was unable to pick the Defendant out of a prior lineup, the second lineup contained a more recent photograph of him. She also tried to remember the license plate number of the vehicle she saw at her house. She believed it to be 468SJP, but the vehicle to which that license plate was affixed did not match the description that Ms. Hensley gave of the vehicle that had been at her house. The Defendant's license plate number was 438SJP. Ms. Hensley described the truck the man was driving as a small red truck with white pinstripes on each side. This description perfectly matched the Defendant's Toyota truck, although the cab of the truck had been painted black. Ms. Hensley also identified the Defendant in open court as the person she saw burglarizing her house. Monica Datz testified that the fingerprint Detective Hope lifted from the victim's money jar matched the Defendant's fingerprint. This evidence is sufficient to establish that the Defendant was the man who entered Ms. Hensley's house without her consent and stole her gun and the money from her jar. Although several witnesses testified that the Defendant was working at the time of the burglary and that his truck was inoperable on that day, the jurors were entitled to discredit their testimony, which they obviously did. This issue is without merit.

Next, the Defendant contends that the trial court imposed an excessive sentence. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993); State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In this case, the presentence report reflects that, at the time of sentencing, the Defendant was thirty-four years old and single.[2] He dropped out of school after the eighth grade, and the only employment information listed in the presentence report states that "the Defendant has worked as a self-employed tree trimmer most of his life." The Defendant's criminal history includes five felony convictions, including convictions for escape, burglary of an automobile, theft of a vehicle, and two convictions for theft. The Defendant has also been convicted of six misdemeanors, two of which were committed while the instant case was pending. The presentence report shows that the Defendant has twice been enrolled in Alcoholics Anonymous. When asked to describe the Defendant's physical and mental health for the purposes of the presentence report, the Defendant's family responded that his physical health was fair, but his mental health was poor due to "bad nerves." They stated that he had been a patient in Lakeshore Mental Hospital, but he was discharged for lack of insurance. They also stated that the Defendant used marijuana on a regular basis, approximately two or three times per month.

At the sentencing hearing, Danny Isbill testified regarding much of the Defendant's prior criminal history, and he also testified that the Defendant had previously been placed on probation, which had been revoked. Furthermore, he testified that by looking at the sentences the Defendant received and the dates on which the subsequent offenses were committed, it was obvious the Defendant had committed several offenses while on some form of release status.

The Defendant testified at the sentencing hearing that he had not burglarized the victim's house, but that he was willing to pay for the property that was stolen. The Defendant's mother, Hester Forester, testified that the Defendant was self-employed as a tree trimmer, and he worked as

[2]The Defendant's sister gave a statement for the presentence report in which she referred to the Defendant as having a wife and baby. Also, the Defendant's mother testified at the sentencing hearing that the Defendant had a wife and an eight-month-old daughter.

much as he could. She said that he had been working to support his wife and child, and they needed him.

After establishing that the Defendant possessed five prior felony convictions, the trial court properly determined that the Defendant was a Range III offender. See Tenn. Code Ann. § 40-35-107(a)(1), (c). A Range III offender convicted of aggravated burglary, a Class C felony, is subject to a potential sentence of ten to fifteen years in confinement. See id. § 40-35-112(c)(3). In determining the appropriate sentence for the Defendant, the trial court found two enhancement factors: (1) the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and (2) the Defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. See id. § 40-35-114(2), (9) (2002 Supp.). The trial court found no mitigating factors. At the conclusion of the sentencing hearing, the trial court enhanced the statutory minimum sentence by one year, resulting in an effective sentence of eleven years.

The Defendant does not challenge the trial court's application of the two enhancement factors. Rather, he asserts that the trial court erred by not finding as a mitigating factor that his "criminal conduct neither caused nor threatened serious bodily injury." See id. § 40-35-113(1). While the Defendant's conduct may have neither caused nor threatened serious bodily injury, we conclude that this mitigating factor is entitled to little weight. In our view, the two applicable enhancement factors justify the enhancement of the statutory minimum sentence by one year. This issue is without merit.

The judgment of the trial court is affirmed.

_____

DAVID H. WELLES, JUDGE